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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

HANK KENNEDY,

Defendant and Appellant.

C064710

(Super. Ct. No. 09F04112)

A jury found defendant guilty of carjacking, assault with a firearm, and second degree robbery (Pen. Code, §§ 215, subd. (a), 245, subd. (a)(2) & 211).<sup>1</sup> The jury also found that defendant personally inflicted great bodily injury and personally used, discharged, and caused bodily injury with, a firearm in the commission of the offenses. (§§ 12022.7, subd. (a) & 12022.53, subds. (b)-(d).) The trial court found defendant had two prior serious felony and strike convictions

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

and sentenced defendant to a term of 75 years to life plus 10 years. (§ 667, subds. (a) & (b)-(i).)

On appeal, defendant contends the trial court erred by: (1) excluding third-party culpability evidence proffered by defense; and (2) imposing a full consecutive term for his assault with a firearm conviction. Defendant's evidence of third-party culpability consisted of mere motive or opportunity to commit the crime in another person. Without more, this evidence was insufficient. The trial court did not err in excluding this evidence. The trial court also did not err in imposing a full consecutive term for the assault with a firearm conviction because the brutal attack and carjacking incidents were separate criminal acts with different objectives, and the brutal attack was gratuitous and unnecessary to accomplish the carjacking. Finding no error, we affirm the judgment.

#### BACKGROUND

This case revolves around a brutal attack on victim KiyLund Lovelady. Lovelady and his sister, T., both know defendant Hank Kennedy, who had been married to their mother for several years.

On the evening of May 16, 2009, T. called Lovelady and asked him to give her and her boyfriend Zack a ride home from Kelly Mohr's trailer. Mohr had previously dated T.'s other brother, but had recently started spending time with Steve Gunderson. When Lovelady arrived at the trailer, defendant and Gunderson were also there.

Defendant left and, shortly thereafter, Gunderson noticed he was missing a \$500 money order.<sup>2</sup> Gunderson told everyone present that no one was leaving until his money order was found. When Gunderson accused T. of taking the money order, T. said that Mohr had taken it. Gunderson threatened T., and Lovelady defended her, repeating that Mohr had taken the money order. Gunderson and Lovelady began arguing and Lovelady told his sister to get her things together so they could leave.<sup>3</sup> Lovelady followed his sister to the back room and waited while she and Zack packed their belongings.

Gunderson called defendant and told him he had gotten into a little confrontation with defendant's stepson. Defendant told him not to do anything to make Lovelady leave and that he would be there shortly.

A short time later, defendant, Gunderson, and a third man unknown to Lovelady and T. -- possibly named John -- appeared in the doorway. Defendant was wearing gloves and carrying a sawed-off .22 rifle with a pistol grip. Defendant grabbed T. by the hair and threw her out the back door. The third man left through the back door.

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<sup>2</sup> Witnesses at trial referred to a "money order" while defense counsel referred to "traveler's checks" in an in camera proceeding.

<sup>3</sup> During this argument, Lovelady learned from Gunderson that defendant was Gunderson's uncle. Gunderson, however, testified that, although he considers defendant to be his uncle, they are not actually related.

Defendant then told Zack to lie face down on the carpet and Zack complied. Defendant pointed his gun at Lovelady, who was sitting on the bed, and demanded the money order. When Lovelady told defendant he did not have it, defendant struck him repeatedly in the head with the gun. Defendant began threatening to kill Lovelady, blaming Lovelady for stealing the money order and for being involved in an alleged burglary of defendant's home on some prior date.

During the beating, Lovelady was crying and pleading to be allowed to go home. He had lain back on the bed to try to protect himself from defendant's repeated blows. He was bleeding from his head. Defendant told Lovelady that he was not letting him go home. He demanded Lovelady's wallet and Lovelady told defendant his wallet was in his truck. Defendant then demanded Lovelady's truck keys and cell phone. Lovelady gave defendant his truck keys, which had been in his pocket, but told defendant he did not have a cell phone. Gunderson reached down and grabbed a cell phone from in or near Lovelady's pocket.

At this point, defendant said, angrily, "You want to fucking lie to me?" and struck Lovelady even harder in the head with the gun. Dazed, Lovelady raised his leg up in an attempt to protect himself as defendant fired the gun. Defendant shot him near the buttocks area. Defendant told Gunderson to take Lovelady's truck and warned Lovelady not to say anything or defendant would kill Lovelady and his "whole family bloodline." Defendant struck Lovelady one more time with the gun and left the room.

Lovelady was losing consciousness. Zack assisted Lovelady as they left the trailer and sought help. Lovelady was ultimately taken to the hospital where he was treated for the gunshot wound, a fractured skull, and bleeding in his brain.

After the attack, both Lovelady and T. heard of threats and were threatened or "warned" by family members, friends of family members, and individuals they believed were Sacramaniac gang members who associated with defendant, not to testify. They were afraid to testify but both testified at trial.<sup>4</sup> Gunderson, who had been charged as a codefendant, pled guilty to second degree robbery during jury selection and agreed to a one-year term in county jail in exchange for his truthful testimony.

A friend of defendant testified that she picked defendant up on the evening of May 16 and brought him to her house. There, defendant worked on an air compressor, ate dinner, watched a movie, and fell asleep on the couch. He left between 7:00 a.m. and 9:00 a.m. the next day. She originally told the defense investigator she picked defendant up on May 17, but later changed the date.

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<sup>4</sup> T. testified that it was because of the threats (after the initial investigation wherein she identified defendant as having arrived with the gun) that she lied to a detective and said she did not know either man with Gunderson, lied to the defense investigator and said it was "a bunch of guys," and lied at an earlier hearing and said she did not see defendant during the incident.

## DISCUSSION

### I

#### *Third-Party Culpability Evidence*

Defendant contends he was denied his federal constitutional rights to present a defense and to due process of law when the trial court excluded his proffered third-party culpability evidence. We disagree.

The California Supreme Court addressed the admissibility of third-party culpability evidence in *People v. Hall* (1986) 41 Cal.3d 826. To be relevant and admissible, evidence of third-party culpability must be direct or circumstantial evidence linking the third person to the actual perpetration of the crimes for which the defendant is being prosecuted. (*Id.* at p. 833.) Evidence of mere motive or opportunity to commit the crime in another person, without more, is insufficient. (*Ibid.*) The decision to admit or exclude third-party culpability evidence is subject to Evidence Code section 352 analysis and is reviewed for abuse of discretion. (*People v. Hall, supra*, 41 Cal.3d at p. 834; *People v. Yeoman* (2003) 31 Cal.4th 93, 140-141; *People v. Lewis* (2001) 26 Cal.4th 334, 372-373.)

Defendant sought to elicit the following third-party culpability evidence. According to defendant, Gunderson was associated with a gang called the Vagos. Also according to defendant, two Vagos gang members had provided Gunderson with forged traveler's checks and Gunderson was required to "kickback" 20 percent of the face value of the checks to the person who provided them. It was defendant's theory that the

witnesses were all lying because they were afraid of retribution from the Vagos gang. Defendant intended to attempt to elicit this testimony from Gunderson because he did not want to testify himself and be exposed to impeachment with his lengthy criminal history.<sup>5</sup>

Defendant argues there was evidence about the attack being over a missing money order and it was the Vagos gang that "would stand to lose as a result of the checks' disappearance" because they would have been owed 20 percent of the cashed checks' face value. Thus, he argues, "there was enough evidence to permit defense counsel to question Gunderson as to the source of the travelers checks, based on the defense position that members of the Vagos gang, the purported source of the checks, committed the assault when they discovered some of them were missing."

Defendant's contention fails. His argument focuses on evidence of *motive*. While there was some proffered evidence that Vagos gang members may have had a motive to assault the victim, evidence of mere motive or opportunity to commit the crime in another person, without more, does not suffice. There was nothing that placed these Vagos gang members at or near the

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<sup>5</sup> Gunderson's court-appointed attorney informed the court that, due to the potential self-inculpatory nature of the testimony regarding the fraudulent checks, Gunderson would be exercising his Fifth Amendment rights and refuse to testify on that issue in the absence of an immunity agreement. The court ultimately granted Gunderson immunity on the matter, although it was after the court excluded the proffered third-party culpability evidence.

trailer at the time of the assault. Indeed, defendant offers no argument to show how any direct or circumstantial evidence actually "link[ed] [these Vagos gang members] to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.) In the absence of such evidence, the proffered evidence was too remote to meet the minimum standards of relevance. (*Ibid.*)

"A fortiori, evidence showing only a third party's possible motive is not capable of raising a reasonable doubt of a defendant's guilt and is thus inadmissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1018.) Defendant has not shown that he had a federal constitutional right to present his third-party culpability theory in the absence of evidence beyond mere motive or opportunity. Accordingly, we conclude there was no error.

## II

### *Consecutive Sentence for Assault with a Firearm Conviction*

Defendant contends that the trial court erred by imposing a full consecutive term for his assault with a firearm conviction. Defendant argues the sentence for the assault with a firearm should be stayed because that offense was part of the same indivisible transaction as the carjacking. We disagree.

Section 654 provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than



one provision." (§ 654, subd. (a).) Section 654 was "intended to ensure that defendant is punished 'commensurate with his [or her] culpability.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishments. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, on the other hand, the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Whether multiple convictions were part of an indivisible transaction is a question of fact for the trial court, and the trial court's finding will be upheld on appeal if it is supported by substantial evidence. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) Here, the trial court expressly stated it found the conduct that underlay the assault count was separate and distinct from the carjacking offense. "We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether there was a single criminal act or a course of conduct with a single criminal

objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.)

Defendant's intent in committing the carjacking was to take the victim's truck (and apparently the victim's wallet that was in the truck). The evidence supports a finding that the assault was not merely a means to that end. Defendant beat the victim severely before he ever appeared to *consider* taking the victim's truck. During that time, he yelled at the victim about stealing a money order and about an alleged prior burglary. The evidence supports a finding that defendant formed the intent to take the truck and cell phone during the attack, when he demanded the victim's wallet and the victim said it was in his truck. Moreover, defendant shot the victim and hit him with the gun again *after* he had already succeeded in obtaining the keys to the truck from the victim. Thus, substantial evidence supports the trial court's finding that defendant's brutal assault upon the victim using the firearm was not a single criminal act or a course of conduct done only with the intent or objective of taking the victim's truck.

Moreover, "a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) Here, the victim had already handed defendant his keys to the truck when defendant shot him, threatened him, and hit him in the head, again, with the gun. Throughout the entire attack, the victim did not

attempt to strike defendant, physically resist defendant, nor escape the room. Defendant's assault on the victim, using the firearm, after obtaining the keys to the truck was gratuitous and unnecessary to accomplish the carjacking. Accordingly, a full consecutive sentence for the assault with a firearm conviction is appropriate.

DISPOSITION

The judgment is affirmed.

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HOCH, J.

We concur:

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RAYE, P. J.

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MAURO, J.